

KELLEY DRYE & WARREN LLP

A LIMITED LIABILITY PARTNERSHIP

1200 19TH STREET, N.W.

SUITE 500

WASHINGTON, D.C. 20036

(202) 955-9600

FACSIMILE

(202) 955-9792

www.kelleydrye.com

DIRECT LINE: (202) 955-9888

EMAIL: jheitmann@kelleydrye.com

NEW YORK, NY

TYSONS CORNER, VA

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November 27, 2002

BY ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W., Room TWB-204
Washington, D.C. 20554

Re: In the Matter of: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98; Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147 - *Ex Parte Notification*

Dear Ms. Dortch:

Yesterday, November 26, 2002, the undersigned, along with Ed Cadieux, Vice President, Regulatory Affairs – Midwest Region of NuVox, Inc., met with Dan Gonzalez of Commissioner Martin's Office to discuss unrestricted access to EELs. The conversation focused on the attached written *ex parte* presentation which was distributed at the meeting. NuVox stated that the record did not support the extension of use restrictions to new EELs or standalone UNEs and that the current constraints on circuits converted from special access to EELs were no longer needed.

In addition, NuVox criticized the EELs segment of the Qwest November 14, 2002 *Ex Parte* on grounds that as aspects of it appear to be more onerous than the current restrictions on conversions (51% local, excluding broadband Internet access) and other aspects (the "architectural solutions") are ambiguous and appear to prohibit the use of EELs for broadband and require termination at a point of interconnection.

If the FCC decided that the record supported extension of the use restrictions currently applicable to conversions of special access circuits to UNE combinations, NuVox suggested that the bright-line rule proposed by ALTS presented an alternative that is much more targeted

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and clear than the existing constraints applicable to circuits converted to EELs or those proposed by Qwest.

In accordance with the Commission's rules, this letter (with attachment) is being filed electronically for inclusion in the public record for each of the above-referenced docketed proceedings. A copy of this submission is being provided to Mr. Gonzalez.

If you have any questions regarding this filing, please notify the undersigned.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John J. Heitmann". The signature is fluid and cursive, with the first name "John" and last name "Heitmann" clearly distinguishable.

John J. Heitmann

JJH/cpa

cc: Dan Gonzalez
Qualex International

ALTS / Allegiance / NuVox / SNiP LiNK / Xspedius
Unrestricted Access to EELs

Ex Parte Presentation

WC Docket Nos. 01-338, 96-98, 98-147

November 25, 2002

Unrestricted Access to EELs

Post UNE Remand

EELs Benefits and Barriers

Benefits of EELs

- Addresses impairment by extending the reach of facilities-based CLEC networks – allowing competition with the ILEC on a more timely, ubiquitous, operationally supportable and cost-effective basis.
- Expands competitive choices and affordable broadband to a significantly greater number of end users.
- Small business customers have upgraded from ILEC analog service to CLEC broadband services provisioned over an “integrated T1” using UNEs and CLEC-provisioned facilities.
- Another case of UNEs spurring innovation, tangible end user benefits and ILEC competitive response.
- Enhances CLECs’ ability to make more efficient use of existing facilities and to justify additional expenditures on new facilities.
- Eases the burdens that collocation places on both ILECs and CLECs.

Unrestricted Access to EELs

Post UNE Remand

EELs Benefits and Barriers

Barriers to EELs

- FCC imposed barriers
 - Temporary use restrictions currently in place are the primary reason why realization of the benefits of converting SPA circuits to EELs has been limited.
 - Restrictions have blocked many C LECs from converting circuits despite the fact that such circuits are used to provide local services to end users.
 - Restrictions have fostered burdensome network grooming.
 - Some facilities-based CLECs have groomed their networks to achieve compliance with the co-mingling restrictions.
 - Some facilities-based CLECs have determined that grooming and additional construction was not practical or could not be cost justified.
 - “Voice” requirements in the safe harbors result in a patently anti-broadband and anti-wholesale bias.
- ILEC imposed barriers
 - Artificial collocation and circuit switch requirements.
 - Conversion processes that are cumbersome and even service-degrading.
 - Attempts to extract grossly excessive non-recurring charges.
 - Open ended conversion process designed to prolong SPA billing.
 - Refusal to enter into reasonable interconnection agreement terms.

Plan A

Removal of Restrictions on Converted Circuits

Time is now more than “up” on the temporary use restrictions

- The record contains no hard evidence that ANY use restrictions are still needed to protect (1) universal service subsidies built into the current transitional ILEC access charge regime, and (2) facilities-based competitive access competition.
- The SPA circuits that facilities-based CLECs seek to convert to UNEs have no apparent impact on universal service subsidies today or on the ability of facilities-based CAPs to compete for the business of the large IXC.
- CALLS access regime transition is well underway.
- BOCs now benefiting from BILLIONS of dollars of new long distance revenues as a result of 271 authority.
- BOCs now benefiting from BILLIONS of dollars of new broadband revenues as a result of UNE-based competition.
- Term plan commitments and termination penalties will continue to protect ILECs from sudden and swift revenue shifts.

Unrestricted Access to EELs

Plan A

Removal of Restrictions on Converted Circuits

Refueling the ILEC Special Access Gravy Train Is Bad Policy

- Competitors and consumers pay a heavy price for the ILEC addiction to supracompetitive SPA pricing.
 - CLECs continue to be forced to order special access instead of UNEs.
 - Provisioning problems and delays.
 - “Cadillacs” and “Chevrolets”.
 - “No facilities”.
 - “Modification”, “construction” and “parity”.
 - ILECs, in recent years, have realized tremendous growth in revenues and profits attributable to special access.
 - 2001 BOC SPA rates of return:
 - SBC 54.6%, BellSouth 49.26%, Qwest 46.58%, Verizon 21.72%
 - 2001 returns exceeded amounts that would have produced an 11.25% rate of return by:
 - SBC ~\$2.5B, BellSouth ~\$1B, Verizon ~\$1B, Qwest ~ \$700M.
- Source: AT&T Special Access Petition.*

Plan B

Tailoring Use Restrictions to Better Serve their Intended Purpose

The current constraints have had unintended, deleterious and unnecessary consequences

- Any constraints must:
 - be more tailored and less burdensome,
 - be easily understood and applied,
 - not work to the detriment of the FCC's important policy objectives of promoting facilities-based local competition and access to broadband.
- CLECs that provide telephone exchange, exchange access and advanced/broadband services to their customers in direct competition with ILECs often have been unable to avail themselves of the existing "safe harbors".
 - The "safe harbors" work as a weapon for the ILECs.
 - Waiver process turns out to be empty option.
 - "Mad science" criteria ignore the way in which services are sold and provisioned to, and used by end users.
 - "Voice" requirements are anti-broadband.
 - Co-mingling and collocation requirements unwarranted.
- BellSouth has harassed CLECs with unauthorized audit requests.
 - NuVox Petition remains pending.
 - PUC litigation ongoing.
- ILECs have expanded the scope of the restrictions to standalone UNEs and new EELs.

Plan B

Tailoring Use Restrictions to Better Serve their Intended Purpose

The focus must change from what a CLEC must do to what it cannot do

- ILEC/FCC goal has been to protect legacy access charge revenues associated with legacy IXC long distance voice services which support universal service and present competitive opportunities for facilities-based CAPs.
- “IXC” is too broad a term to be used without qualification.
 - “CLECs” and “ILECs” are almost always “IXCs” – “IXCs” are not always “LECs”.
 - CLECs, ILECs and CAPs provide exchange access to themselves and others.
 - IXCs that are not also CAPs or LECs buy exchange access.
- Concerns that “IXCs” can skirt the legacy access charge regime are best addressed by a bright-line rule that states what cannot be done, rather than by the current constraints which include varying concoctions of what must be done.
- Any use restriction adopted could avoid snaring facilities-based CLECs by focusing on those carriers that use SPA end user circuits exclusively for legacy interexchange voice traffic.

Unrestricted Access to EELs

Plan B

Tailoring Use Restrictions to Better Serve their Intended Purpose

A bright-line rule grounded in court-approved FCC precedent

- Any new constraint on SPA to EEL conversions should be consistent with the Commission's rules regarding cost-based interconnection under Sections 251 and 252 which were designed to serve the same policy goals.
 - Local Competition Order: a carrier is not entitled to cost-based interconnection at TELRIC rates, if it seeks such interconnection exclusively for the exchange of interexchange traffic.
 - Affirmed by the Eighth Circuit.
 - No notable ILEC claims of abuse by IXC.
 - For the same reasons underlying that decision, the Commission could restyle its current use restriction so that it bars the conversion of end user SPA circuits used by carriers that function exclusively as IXCs with respect to those end users.

Plan B

Tailoring Use Restrictions to Better Serve their Intended Purpose

A bright-line rule grounded in court-approved FCC precedent

- The proposed bright-line restriction setting forth what a requesting carrier could not do is this:
 - **A requesting carrier may not convert SPA circuits that are connected to switching equipment used exclusively to provide interexchange voice services or that are used exclusively to serve a customer for which the requesting carrier provides no local or broadband services.**
 - **No “co-mingling” restriction.**
 - There is no need to prevent sharing facilities with tariffed services *or* connection to a tariffed service.
 - A co-mingling restriction would:
 - inhibit the efficient use of network inputs,
 - create perverse incentives for the construction of inefficient and balkanized networks,
 - protects tariffed services for which there are no competitive alternatives and that do not generate contributions to universal service.
 - **No collocation requirement.**
 - The restriction would not apply when a circuit terminates to a requesting carrier’s collocated facilities.
 - This would be a rebuttable presumption, whereby an ILEC could overcome the presumption by demonstrating that a requesting carrier operates exclusively as an interexchange voice carrier.
 - **No “local voice” requirement.**
 - A local voice requirement ignores the needs of consumers and is patently anti-broadband.

Additional Concerns

New EELs and Standalone UNEs

No use restriction should apply to New EELs or Standalone UNEs

- A new use restriction should not apply to new EELs (ordered directly as UNE combinations) or to standalone UNEs.
- Since CLEC new EEL orders do not result in the substitution of UNE combinations for existing SPA, ILEC legacy SPA revenues are not implicated by new EELs.
- No collapse in ILEC SPA revenues, universal service funding, or facilities-based exchange access competition in markets where new EELs have been available as a result of the circuit switching exemption.
 - The record contains no evidence of any detrimental impact in this regard caused by unrestricted access to new EELs.
- No collapse in ILEC SPA revenues, universal service funding, or facilities-based exchange access competition in states where PUCs have required unrestricted statewide access to new EELs.
 - The record contains no evidence of any detrimental impact in this regard caused by unrestricted access to new EELs.

Additional Concerns

SPA to Standalone UNE Conversions

CLECs must remain able to convert SPA to standalone UNEs

- The Commission must reject ILEC attempts to restrict or deny CLECs' ability to convert SPA circuits to standalone loops or transport UNEs.
- CLECs remain impaired without access to high cap UNE loops and transport.
 - No compelling need or policy justification for imposing restrictions on conversions of SPA to standalone UNEs.
 - Carriers have been converting SPA circuits to standalone UNEs for years.
 - ILEC SPA revenues have not fallen off a cliff.
 - No evidence that universal service funding or facilities-based access competition have been compromised.
- CLECs are often forced to order SPA instead of UNEs initially to ensure that customer need can be timely met with limited service interruption.
 - UNE provisioning is not uniformly predictable or reliable.
 - ILECs increasingly have replaced operational impediments with self-created policy impediments.
 - "No facilities".
 - No connection to or combination with "tariffed services".

A Final Note

Facilities-based CLECs do not support the imposition of restrictions on circuits converted from SPA to EELs – or on new EEL combinations, conversions of SPA to standalone UNE loops and transport, or any other UNEs.

This ex parte merely suggests a way in which the existing use restrictions could be more narrowly tailored (thereby limiting the adverse effects on facilities-based competition and end users), if the Commission supports the continued imposition of use restrictions on conversions of SPA to EELs.